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## Raising the Level of Compliance with the Clean Water Act by Utilizing Citizens and the Broad Dissemination of Information to Enhance Civil Enforcement of the Act

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## NOTES

### RAISING THE LEVEL OF COMPLIANCE WITH THE CLEAN WATER ACT BY UTILIZING CITIZENS AND THE BROAD DISSEMINATION OF INFORMATION TO ENHANCE CIVIL ENFORCEMENT OF THE ACT

*History shows again and again  
How nature points out the folly of men.*<sup>1</sup> —

Donald Roeser

#### INTRODUCTION

When evaluating the effect of environmental laws, we often take compliance for granted.<sup>2</sup> We assume that the voice of conscience and the potential for penalties will result in perfect compliance.<sup>3</sup> This is not the case, however.<sup>4</sup> In the early 1970s, Congress recognized that past attempts at environmental regulation had failed due partly to inadequate enforcement.<sup>5</sup> Congress therefore included a strong enforcement framework in subsequent environmental statutes, including the Clean Water Act (the “Act”).<sup>6</sup>

Enforcement of the Act plays an important role in the cleanup and continued usefulness of the nation’s waterways.<sup>7</sup> Better enforcement requires companies to internalize costs associated with pollution that society would otherwise have to bear.<sup>8</sup> Broad enforcement, thus, improves compliance with

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1. BLUE OYSTER CULT, *Godzilla, on SPECTRES* (Columbia Records 1977).

2. See BARRY C. FIELD, ENVIRONMENTAL ECONOMICS 219 (1994) (“When we evaluate these policies ex ante we often assume implicitly that the penalties written into the law will be sufficient to produce complete compliance.”).

3. See *id.*

4. See *id.* (“[T]his in fact is never the case. Pollution control laws, like any others, require enforcement, and this takes resources.”).

5. See Phillip M. Bender, *Slowing the Net Loss of Wetlands: Citizen Suit Enforcement of Clean Water Sec 404 Permit Violations*, 27 ENVTL. L. 245, 264 (1997).

6. See *infra* notes 22-72 and accompanying text.

7. See *Water Pollution Prevention and Control Act of 1991: Hearings on S. 1081 Before the Subcomm. on Env'tl. Protection of the Senate Comm. on Env't and Public Works*, 102d Cong. 688 (1991) (statement of John Martin, Inspector General, EPA) (“vigorous enforcement is pivotal in promoting improved water quality”).

8. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); see also FIELD, *supra* note 2, at 71 (“[A]t the end of the year the profit-and-loss statement . . . will contain no reference whatever to . . . real downstream external costs.”).

the Act and better achieves the Act's goals of increasing the number of waterways that are "fishable" and "swimmable."<sup>9</sup> Better enforcement of existing regulations achieves these goals in a way that apportions the costs of improved water quality more equitably than does the adoption of more stringent regulations.<sup>10</sup>

In developing the enforcement framework of the Act, Congress recognized that in order to achieve the Act's stated goals it had to design an enforcement system that would not be susceptible to localized political pressures and budget constraints.<sup>11</sup> The Federal Government, however, had neither the budget nor the expertise to enforce the regulations on a national level.<sup>12</sup> Therefore, Congress developed a program whereby the states have primary enforcement responsibility,<sup>13</sup> with the Federal Government retaining enforcement authority when the states fail to exercise these responsibilities.<sup>14</sup>

Because states also have bounds on their ability to enforce the regulations, as an additional check, Congress empowered citizens to sue to enforce the regulations.<sup>15</sup> Citizens can thus step in and enforce the Act when there are insufficient levels of compliance and budgetary or political pressures constrain governmental enforcement efforts.<sup>16</sup> In this way, citizens can

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9. The stated goals of the Clean Water Act include making all waters fishable and swimmable by July 1, 1983. *See* 33 U.S.C. § 1251(a)(2) (1994).

10. *See infra* Part III.

11. *See* Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 699-700 (D.C. Cir. 1975) (discussing the inclusion of a similar enforcement framework and its implementation through the Clean Air Act).

12. *See* David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1571 (1995) ("[Q]uantity, variety, and geographic dispersion of those regulated by [major environmental] laws is so great that enforcement would be impossible if left solely to the federal government.").

13. *See* 33 U.S.C. § 1342(b) (1994).

14. *See id.* § 1319(a)(3); *see also id.* § 1342(i) ("Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.").

15. The Act provides: "[A]ny citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter." *Id.* § 1365(a).

Although there is some discussion of the dual role of the citizen, both acting as a private attorney-general and as a private citizen enforcing rights as an individual, this Note discusses the citizen's rights generically. For an in-depth discussion of the dual role that the citizen plays in this enforcement scheme, see Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome Independent Values*, 22 GA. L. REV. 337 (1988); James M. Hecker, *The Citizens Role in Environmental Enforcement: Private Attorney General, Private Citizen, or Both?*, NAT. RESOURCES & ENV'T, Spring 1994, at 31; Jeannette L. Austin, Comment, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys*, 81 NW. U. L. REV. 220 (1987).

16. *See* Bender, *supra* note 5, at 263-69.

perform an important supplemental role in the enforcement of the Act.<sup>17</sup> Unfortunately, however, the courts often seem hesitant to “unleash” the people on the polluters.<sup>18</sup> As a result, the last tier of the enforcement mechanism—the citizen suit—cannot help to ensure compliance with the Act.<sup>19</sup>

Citizens are faced with a number of problems in bringing enforcement actions. Congress can and should take action to minimize some of these obstacles. For instance, citizen groups must spend immeasurable resources to determine which parties are not complying with their permits. Congress should reduce the costs that citizens incur in acquiring information by requiring permit holders to make public reports of exceedances annually. Having the information easily available would ease the economic burden on the citizen bringing the suit.

Additionally, once an action is filed, these citizen groups must spend more resources meeting the threshold requirement of standing before reaching the merits.<sup>20</sup> The Third Circuit has recently adopted more stringent requirements to show standing by requiring a showing of injury to the receiving water.<sup>21</sup> Even if the Third Circuit’s interpretation of the citizen suit language is correct, Congress should recognize that citizen enforcement is an essential element of the Act and take steps to ensure its continued vitality. To this end, Congress should clearly define that every citizen has a right to utilize water bodies that are free from discharges in violation of an effluent standard in any permit. Such a definition would make clear that such a violation would be an injury in fact to any citizen that utilized that water body and would help ensure that a greater number of citizen suits would reach the merits.

Part I of this Note describes the enforcement framework currently in place under the Clean Water Act, paying special attention to weaknesses in the system that lead to nonenforcement against violators. Part II discusses whether the violation of an effluent standard is a legal injury to the rights of the citizen. Part III briefly analyzes which persons benefit from the

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17. For a detailed discussion about some of the conflicts arising in this triangular system of enforcement, see generally Hodas, *supra* note 12.

18. See *Public Interest Research Group, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997).

19. But see Zygmunt J.B. Plater, *From the Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981, 1007 (1994) (“[I]f citizens did not enforce the law, no one would.”); see also WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 275 (2d ed. 1994) (“The citizen suit provisions are ideal instruments to enforce any and all departures from NPDES permit conditions.”).

20. See *Magnesium Elektron*, 123 F.3d 111.

21. See *id.*

nonenforcement of the Act and discusses the need for stricter enforcement prior to the enactment of a more stringent statute or more stringent regulations. Part IV concludes the analysis and proposes a means of enhancing civil enforcement of the Act.

## I. CURRENT ENFORCEMENT FRAMEWORK OF THE CLEAN WATER ACT

Congress enacted the law that has become commonly known as the Clean Water Act<sup>22</sup> in response to numerous incidents that culminated in the Cuyahoga River catching fire.<sup>23</sup> In the Act, Congress included lofty goals,<sup>24</sup> a comprehensive permit system to meet those goals,<sup>25</sup> and a well-defined enforcement framework.<sup>26</sup>

The Act expressly prohibits discharges of pollutants into the waters of the United States unless authorized by a permit.<sup>27</sup> Any discharger of any pollutant into a navigable water of the United States must acquire a National Pollutant Discharge Elimination System (“NPDES”) permit.<sup>28</sup> The NPDES permit defines the receiving water and limits the amount of pollutants that the permittee may discharge into the receiving water.<sup>29</sup> The permittee must also “monitor and report on its compliance with its permit.”<sup>30</sup>

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22. “[T]his act may be cited as the ‘Federal Water Pollution Control Act’ (commonly referred to as the Clean Water Act).” Clean Water Act of 1977, Pub. L. No. 95-217, § 518, 91 Stat. 1566 (codified in scattered sections of 33 U.S.C.). For consistency purposes it will be referred to as either the Clean Water Act or the Act throughout this paper.

23. See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1276 (1994)).

24. “The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a) (1994). The stated goals include making all waters fishable and swimmable by 1983. See *id.* § 1251(a)(2). It also set a national goal of eliminating the discharge of pollutants into navigable waters by 1985. See *id.* § 1251(a)(1).

25. See *id.* §§ 1342, 1344.

26. The enforcement framework in the Clean Water Act is in many ways similar to that found in the Clean Air Act. See RODGERS, *supra* note 19, at 249. One of the key similarities is the inclusion of a citizen suit provision. Compare 33 U.S.C. § 1365 (Clean Water Act), with 42 U.S.C. § 7604 (Clean Air Act). Almost every environmental statute enacted since the Clean Air Act contains a citizen suit provision. See, e.g., 15 U.S.C. § 2619 (Toxic Substances Control Act); 16 U.S.C. § 1540(g) (Endangered Species Act); 30 U.S.C. § 1270 (Surface Mining Control and Reclamation Act); 42 U.S.C. § 3006j-8 (Safe Drinking Water Act); 42 U.S.C. § 9659(a) (Comprehensive Environmental Response Comprehension and Liability Act); 42 U.S.C. § 6972(a) (Resource Conservation and Recovery Act); 42 U.S.C. § 11046(a)(1) (Emergency Planning Community Right to Know Act).

27. Section 301 of the Clean Water Act provides: “Except as in compliance with this section and sections . . . of this title [authorizing permits], the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a) (1994).

28. Section 402 requires that a permit for the discharge of a pollutant only be issued if the discharge meets the requirements under the Act, including any and all control requirements under other sections. See *id.* § 1342(a), (b).

29. See *id.* § 1342.

30. *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1519 (9th Cir. 1987). “The Clean Water

Companies and citizens have numerous incentives to comply with the Act and regulations promulgated under the Act.<sup>31</sup> Congress and commentators recognized that, absent a threat of enforcement, altruistic incentives were not sufficient to ensure compliance with the Act.<sup>32</sup> Thus, Congress included an enforcement framework similar to that found in the Clean Air Act.<sup>33</sup>

Under this enforcement framework, the states, the Federal Government acting through the Environmental Protection Agency ("EPA"), and citizens all have enforcement authority.<sup>34</sup> The states have primary enforcement responsibility and authority.<sup>35</sup> The EPA<sup>36</sup> and citizens<sup>37</sup> also have enforcement authority that they can employ when the states fail to exercise their enforcement responsibilities. Each of these groups performs an important role in the enforcement of the Act.<sup>38</sup>

While citizens are somewhat more limited in their enforcement authority,<sup>39</sup> states with federally approved programs, as well as the EPA, have the authority to enforce violations of any condition or limitation.<sup>40</sup> A "violation of any condition or limitation" includes all violations of permit provisions, including recordkeeping and monitoring violations.<sup>41</sup> The enforcement authority includes the power to assess civil penalties<sup>42</sup> or initiate a civil judicial action.<sup>43</sup> It also includes the ability to seek fines of up to

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Act provides that each discharger holding a NPDES permit shall monitor and report on its compliance with its permit. Each discharger must install, use, and maintain monitoring equipment and must sample its effluents. The discharger must report the results of its self-monitoring to the EPA and the state agency that issues the permit." *Id.* at 1519 (citing 33 U.S.C. § 1318(a)(4)(A)).

31. See FIELD, *supra* note 2, at 4. These incentives include the nature of all people to comply with the law, the moral obligation to provide a clean environment for employees and citizens, and the economic benefits associated with a healthier work force and client base. See *id.*

32. Field explains that "the reason people pollute is they lack the moral and ethical strength . . . and environmental problems are too important to wait for a long process of moral rebuilding" and that "the economy and its institutions are set up [in a way to] lead people to make decisions that result in environmental destruction." *Id.*

33. See S. REP. NO. 92-414, at 143 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3730 ("In writing the enforcement procedures involving the Federal Government the Committee drew extensively upon the provisions of the Clean Air Act of 1970.").

34. See *infra* Part I.A.

35. See 33 U.S.C. § 1342(b) (1994).

36. See *id.* § 1319(a)(3); see also *id.* § 1342(i) ("Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.").

37. See *id.* § 1365.

38. For a detailed discussion about the roles of each party and some of the conflicts arising in this triangular system of enforcement, see generally Hodas, *supra* note 12.

39. See *infra* Part I.C.

40. See 33 U.S.C. § 1319(a).

41. *Id.* § 1319(a)(1).

42. See *id.* § 1319(g).

43. See *id.* § 1319(b).

\$27,500 per day for each violation<sup>44</sup> or to bring a criminal action against a violator.<sup>45</sup> The Act also renders persons or entities strictly liable for violations of any permit condition or effluent standard.<sup>46</sup>

Despite these efforts, the results Congress envisioned have not been achieved. While rivers are no longer catching fire, at least one-third of the surveyed waters of the United States are neither fishable nor swimmable.<sup>47</sup>

#### *A. Analysis of the Enforcement Framework*

A state can receive approval from the EPA to administer and operate the NPDES permit program within the state.<sup>48</sup> If a state does not have an approved program, the Federal Government retains primary responsibility for enforcement of the Act.<sup>49</sup> Approval of a state program requires a showing that, among other things, the state has sufficient power to enforce the program.<sup>50</sup> The existence of approved state programs has been, and remains, a high priority of the Federal Government.<sup>51</sup> Once the state has an approved program under section 402, the state becomes the primary enforcement authority having full statutory enforcement powers at its command.<sup>52</sup> Yet, even after primary enforcement is delegated to the state, the Federal Government still retains a role in enforcement of the Act.<sup>53</sup>

States may choose not to enforce against an industry group, company, or

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44. *See id.* § 1319(d). Although this section lists the penalties as \$25,000 per day, Congress has since amended all environmental penalties, increasing them to \$27,500 by the inflation adjustment rule. *See* Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (1996).

45. *See* 33 U.S.C. § 1319(c).

46. *See, e.g.,* Stoddard v. Western Carolina Regional Sewer Authority, 784 F.2d 1200, 1208 (4th Cir. 1986) (holding that liability under Clean Water Act is a form of strict liability).

47. *See* Albert S. Gore, Jr., *The Clean Water Act: A Snapshot of Progress in Protecting America's Waters* (last modified Oct. 20, 1997) <<http://www.epa.gov/owow/wtr1/cwa/25report.html>>.

48. *See* 33 U.S.C. § 1342(b).

49. *See id.* § 1342(a).

50. *See id.*

51. *See* RODGERS, *supra* note 19, at 363.

52. *See id.* Rodgers points out that there were 37 approved programs by 1993. *See id.* at 363 n.15. This Note discusses only this majority of states. One commentator has divided the states with approved programs into different categories, based upon their degree of enforcement and environmental consciousness. *See* Hodas, *supra* note 12, at 1579-80. All states, however, have common pressures and potential problems in their environmental enforcement systems. *See infra* notes 73-76 and accompanying text. While recognizing that some states are doing a better job of enforcing the environmental regulations than other states, this Note discusses problems with state enforcement generically.

53. “‘Our responsibility is not to get along with the states, it is to ensure compliance . . . . Unless the states have a gorilla in the closet, they can’t do the job. And the Gorilla is EPA.’ Mr. Ruckelshaus later gave voice to his frustration that the gorilla was sleeping soundly despite his best efforts to wake it.” RODGERS, *supra* note 19, at 181 (quoting EPA administrator William Ruckelshaus) (internal citations omitted).

individual for many reasons.<sup>54</sup> In those situations, the Federal Government, acting through the EPA, can step in and enforce the Act.<sup>55</sup> In this way, the Federal Government acts as a safety net to ensure enforcement of the Act when localized political pressures, special interest groups, lack of professional expertise, or budgetary constraints otherwise have resulted in inadequate enforcement.<sup>56</sup> Effectively, then, the Federal Government retains full statutory enforcement authority even in states with approved programs.<sup>57</sup>

Although the Federal Government retains full statutory enforcement authority, in states with approved programs it neither acts as, nor aspires to become, the primary enforcement authority.<sup>58</sup> It is vital to the system, however, that the Federal Government, in its capacity as a secondary enforcement authority, continues to bring a significant number of enforcement actions.<sup>59</sup>

The Act also empowers citizens with the authority to enforce the Act.<sup>60</sup> Citizen awareness of, and concern for, pollution issues at the local level renders citizens more likely to discover violations of the Act.<sup>61</sup> These citizens often are members of citizen groups, such as the Sierra Club, Public Interest Research Group, and Natural Resource Defense Council,<sup>62</sup> which are well-equipped to bring suits on behalf of their members to stop violations.<sup>63</sup> Citizens stand ready to act, individually or through these organizations, to

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54. See *infra* notes 73-76 and accompanying text.

55. See, e.g., T.C. Brown, *U.S. Tells Giant Egg Farm to Stop Polluting Creek*, PLAIN DEALER (Cleveland), June 11, 1997, at 5B (citing alleged inaction by state as reason for EPA action); *Toothless Environmental Protection; State Inaction: Weak Enforcement Record Prompts Federal EPA Intervention*, BALTIMORE SUN, August 26, 1996, at 10A ("Maryland's enforcement lassitude has prompted the Environmental Protection Agency to press the state" and "in some egregious cases of state foot-dragging . . . to issue its own citations and stiff penalties.").

56. See *infra* notes 73-76 and accompanying text.

57. Before bringing an action, EPA policy requires it to consider "(1) the type of case; (2) the timeliness and appropriateness of the state enforcement action; and (3) the adequacy of the penalty imposed at the state level." Hodas, *supra* note 12, at 1586.

58. See *id.* ("[E]ven if only a small number of delegated states returned their programs to EPA, [EPA's] enforcement program would not be able to cope with the new responsibilities. Ultimately, there would be less enforcement not more.").

59. See generally *id.* The number of actions brought by the EPA for violations of the Clean Water Act has decreased. After averaging close to 2,000 administrative actions under the Clean Water Act from 1989-1994, this number dropped to 1,100 for 1995-1996. EPA, *FY 1996 Enforcement and Compliance Assurance Accomplishments Report* (last modified Feb. 18, 1998) <<http://es.epa.gov/oeca/96accomp/index.html>>. Similar decreases are seen in administrative compliance orders as well as administrative penalty order complaints. See *id.* at A-2.

60. See 33 U.S.C. § 1365 (1994).

61. See generally Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990).

62. See *id.* at 353.

63. See *id.* at 351.



alert state and federal regulating agencies to violators.<sup>64</sup>

Section 505 of the Act delegates to citizens the power to stand in the stead of the EPA, in a position similar to private attorneys general,<sup>65</sup> to enforce any violation of an effluent standard or limitation by a permittee.<sup>66</sup> This includes any violation of any permit provision, including recordkeeping and monitoring violations.<sup>67</sup> Thus, citizens may initiate actions when the state or federal enforcement authority knows of a violation but fails to pursue the violator diligently.<sup>68</sup> Also, citizens may bring claims when the state or federal enforcement authority is unable to do so because of budgetary constraints.<sup>69</sup> By filing notice of suits,<sup>70</sup> citizens bring ongoing violations to the attention of both state and federal enforcement authorities.<sup>71</sup> Additionally, citizens may sue the EPA to compel it to perform any nondiscretionary duty under the Act.<sup>72</sup>

### *B. Limitations on State and Federal Enforcement*

States face extreme pressures in the enforcement of the Act. Special interest groups with incentives to avoid environmental controls are a powerful force in the political arena.<sup>73</sup> Localized industrial groups may be able to exert enough pressure through campaign contributions and other

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64. *See id.* (“[N]ationally or regionally organized environmental groups . . . account for roughly two-thirds of enforcement actions under the [Clean Water] Act.”).

65. *See* Hecker, *supra* note 15 (noting that a citizen suing under the Act is suing on her own behalf and that she therefore must have standing and may not invoke the standing of the government as may a plaintiff in a *qui tam* action).

66. *See* 33 U.S.C. § 1365(a) (1994).

67. *See id.* § 1365(a), (f).

68. An important priority, though beyond the scope of this Note, is the general enhancement of educational awareness of environmental issues. By teaching our children how to detect violations and the effects of these violations, many more people are getting involved in protecting the environment in which they live. This awareness should have positive impacts on compliance within the regulated community.

69. *See* Hodas, *supra* note 12, at 1649-51 (discussing incidents in which state preemption of strong cases resulted in the state pursuing some violators, while citizen groups still pursued the weaker cases resulting in more enforcement).

70. Section 505(b) requires that prior to filing suit, the citizen must give notice to the administrator, the state agency, and the violator. *See* 33 U.S.C. § 1365(b) (1994).

71. *See* Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 849 (1985). This notice period allows the EPA or state agency to assess the action and possibly bring its own suit against the polluter. *See id.*

72. *See* 33 U.S.C. § 1365(a)(2).

73. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1213 (1977); *see also* FIELD, *supra* note 2, at 223 (“[I]t’s a matter of local . . . authorities applying the law to local sources, and in this process there can be a great deal of informal give and take.”).

measures to avoid or inhibit enforcement of the Act.<sup>74</sup> Additionally, executives and regulatory agencies may essentially negate these regulations by nonenforcement or lackadaisical enforcement as part of a “race to the bottom” to attract businesses and jobs.<sup>75</sup> Finally, states face limited budgets that often cannot finance adequate enforcement.<sup>76</sup>

Many of the same forces that hinder enforcement by state governments also act to limit the Federal Government’s enforcement power through the EPA.<sup>77</sup> The EPA also faces some problems that are unique to itself. The agency is not immune to budget constraints, and attempting to administer such a large-scale program on a national level is costly even in a secondary role.<sup>78</sup> The EPA lacks the staff necessary to discover all violations or to

74. See Stewart, *supra* note 73, at 1213. These localized political pressures could result in environmental noncompliance “hot spots.” See *id.*

75. See *id.* at 1212.

Given the mobility of industry and commerce, any individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry and obstacles to economic development for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards.

*Id.*; see also Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 HASTINGS L.J. 271 (1997). But see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1253 (1992) (suggesting that “the forces of interstate competition, far from being conclusively undesirable, are at least presumptively beneficial”). Although environmental pressures may not be a large enough concern to relocate existing businesses, it would be foolish to believe that companies do not consider environmental pressures when opening new plants. State competition for jobs has resulted in numerous incentives to companies for locating facilities in the state. See, e.g., Donald L. Barlett & James B. Steele, *Special Report/Corporate Welfare*, TIME, Nov. 9, 1998, at 36. These incentives range from tax breaks to low cost land for siting of the facility. See *id.* Additionally, some right to work states entice companies to build by not being sympathetic to labor organizations. See generally H. Milward & H. Newman, *State Incentive Packages and the Industrial Location Decision*, 3 ECON. DEV. Q. 203 (1995); Barry P. Warren, *Assessing the Policy Implications of State Incentives: Firm Specific Vis-a-vis Economic Growth Strategies*, ECON. DEV. REV., Spring 1996, at 47; cf. Alfred C. Aman, Jr., *The Earth As Eggshell Victim: A Global Perspective on Domestic Regulation*, 102 YALE L.J. 2107 (1993) (same); Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039 (1993) (discussing international effect of differing environmental regulations on global location decisions and economics); Edith Brown Weiss, *Environmentally Sustainable Competitiveness: A Comment*, 102 YALE L.J. 2123 (1993). But cf. Theodore M. Crone, *Where Have All the Factory Jobs Gone—and Why?*, BUS. REV. (FEDERAL RESERVE BANK OF PHILADELPHIA), May/June 1997, at 3 (stating that “when environmental regulations are mentioned in surveys of plant-location decisions, they do not rank high on the list of concerns”).

76. See FIELD, *supra* note 2, at 219-20 (“Since public enforcement agencies always work under limited budgets it is not a foregone conclusion that enough resources will ever be devoted to enforcement to achieve acceptable levels of compliance.”). Despite these budgetary constraints, state administrative orders have continued to climb throughout the 1990s, reaching an all-time high of 4,598 actions under the Clean Water Act for fiscal year 1996. See EPA, *supra* note 59. States receive limited funding from the Federal Government to implement environmental regulations.

77. See *supra* notes 73-76 and accompanying text.

78. It is estimated that the United States invests \$100 billion per year to control and prevent

initiate enforcement actions against all violators of the Act.<sup>79</sup> Additionally, numerous political pressures bear on enforcement of the Act by the EPA.<sup>80</sup> As a result of all of these problems, the EPA is only able to pursue a fraction of all violators.<sup>81</sup>

In situations in which the EPA is unable to pursue a violator, there is little that it can do to ensure state enforcement. There are currently only two tools available to the EPA when a state fails to enforce the Clean Water Act. Other than stepping in and enforcing the act itself,<sup>82</sup> the EPA can only withdraw approval of the entire state program and administer the program within the state.<sup>83</sup>

### *C. Roadblocks to Effective Citizen Enforcement*

Recognizing the limits of governmental enforcement capabilities, Congress gave citizens the authority to enforce the Act.<sup>84</sup> At the same time, however, Congress acknowledged the potential dangers of unlimited citizen enforcement.<sup>85</sup> Thus, while explicitly authorizing citizen suits under section

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pollution. And since 1990, the EPA has had a budget in excess of five billion dollars per year. *See* EPA, *Summary of EPA's FY 1998 Presidential Budget* (visited Jan. 27, 1998) <<http://www.epa.gov/ocb/budget.htm>>. The 1998 budget calls for \$7.6 billion to be appropriated for federal EPA programs. *See id.*

79. *See supra* note 58 and accompanying text.

80. *See generally* Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1 (1994). *But cf.* David B. Spence, *Administrative Law and Agency Policy Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407 (1997) (discussing the inability of the President or Congress to exercise control over informal agency decisions such as policy guidance).

81. As professor David Hodas points out,

Our System of public environmental enforcement is more fragile and overwhelmed than most people realize. Annual enforcement accomplishment reports praise government's effectiveness in enforcing the law. But, there is less than meets the eye to claims that the law is being effectively enforced. Despite the many enforcement success stories reported by the government, the number of violations overwhelm the enforcement capacity of both the federal and state governments.

HODAS, *supra* note 12, at 1558-60 (footnotes omitted).

82. *See* 33 U.S.C. § 1319(a)(1) (1994).

83. *See id.* § 1319(a)(2). It is true that Congress could add the threat of sanctions to the Act, similar to those in the Clean Air Act, *see* 42 U.S.C. §§ 7509, 7616(a)-(b), but to accomplish this added threat of sanctions, more power and flexibility would have to be given to the states in accomplishing the goals of the Act. While it would not be uncommon for the Clean Water Act to borrow from the Clean Air Act, *see* RODGERS, *supra* note 19, at 248, the EPA's willingness to use sanctions has been at best mixed. *See* Stephen M. Esposito, *State Plans for Clean Air: Have the Section 179 Sanction Provisions Become the Achilles Heel of the Clean Air Act?*—Natural Resources Defense Council, Inc. v. Browner, 57 F.3d 1122 (D.C. Cir. 1995), 15 TEMP. ENVTL. L. & TECH. J. 241 (1996).

84. *See* 33 U.S.C. § 1365.

85. *See* Michael P. Healy, *Still Dirty After Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suits*, 24 ECOLOGY L.Q. 393, 450-53 (discussing whether availability of citizen suits will lead to inefficient level of enforcement).

505 of the Act,<sup>86</sup> Congress established limits on citizen enforcement.<sup>87</sup>

The Act limits citizen initiated actions in a number of ways. First, the Act limits the remedies available to citizens to the recovery of attorney's fees,<sup>88</sup> civil penalties where appropriate,<sup>89</sup> and injunctive relief.<sup>90</sup> Next, the Act requires citizens to send a sixty-day notice of intent to sue to the violator and to the administrator.<sup>91</sup> The Act also precludes citizen initiated suits for conduct that is the subject of a civil or criminal action against the violator being diligently prosecuted by the administrator.<sup>92</sup> Additionally, the Supreme Court has determined that the Act authorizes citizen suits only when there is a good faith allegation that the violation is continuing;<sup>93</sup> therefore, citizens may not initiate an action based solely on wholly past violations.<sup>94</sup> Finally, the Act only allows citizens to enforce the permit as written.<sup>95</sup>

In addition to these statutory limits, citizens also face functional obstacles to private enforcement. Citizens bringing a suit may incur high information costs.<sup>96</sup> Although the Act gives the citizen the right to sue for violations, the

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86. See 33 U.S.C. § 1365.

87. The Supreme Court, in *Gwaltney, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 56-57 (1987), pointed out that the citizen suit provision was not to be used primarily as a penalty, but as a method of bringing companies into compliance with their permitted effluent limitations.

88. See 33 U.S.C. § 1365(d).

89. See *id.* § 1365(a). In an effort to ensure that the enforcement actions were brought for altruistic reasons, the civil penalties that are recovered under citizen suits are payable to the United States Treasury. See *id.* § 1319(d).

90. See *id.* § 1365(a).

91. See *id.* § 1365(b). This not only allows the violator an opportunity to bring the facility into compliance, it also allows the administrator an opportunity to bring an action under the Act. See Boyer & Meidinger, *supra* note 71, at 849.

92. See 33 U.S.C. § 1319(g)(6) (reinforcing the idea that citizen suits are a supplement to enforcement by states and the Federal Government).

93. In *Gwaltney*, the Supreme Court considered the language of the citizen suit provision in depth. The Court determined that the term "alleged to be in violation" means that citizens can only bring an action for continuing violations. *Gwaltney*, 484 U.S. at 57. Thus, the Court concluded that citizens have no right to sue under the Clean Water Act for wholly past violations. See *id.* The Court reasoned that this limitation would effectuate the goals of the Clean Water Act. See *id.* This ruling is subject to considerable comment, much of which is negative. See, e.g., Beverly McQueary Smith, *The Viability of Citizen's Suits Under The Clean Water Act After Gwaltney* of Smithfield v. Chesapeake Bay Foundation, 40 CASE W. RES. L. REV. 1 (1989-90).

94. See *Gwaltney*, 484 U.S. at 59.

95. For example, 33 U.S.C. §§ 1365(a), (f) do not provide for a citizen's right to challenge a permit. See Hodas, *supra* note 12, at 1578 ("Citizen enforcement does not redraft the CWA, EPA's CWA regulations or any NPDES Permits."). Thus, a citizen cannot bring an action under the Act to challenge a permit as insufficient if the permit complies with the Act. See *id.*; see also 33 U.S.C. §§ 1365(a), (b).

96. See Hodas, *supra* note 12, at 1649. The cost of doing the investigation, preparing the notices, and other preparations alone averaged over \$2,200 for each of 19 notices filed by NDRC in an initiative undertaken in 1986. See *id.*

citizen must expend his own time and money to find the violations.<sup>97</sup> Because the information about permit violations is not always readily available to the citizens, some egregious offenders may be overlooked.<sup>98</sup>

Citizens also face procedural roadblocks. A great deal of time and funds are spent battling over the issue of whether the claim brought by the citizen, or citizen group, is justiciable under the “case or controversy” requirement in Article III of the Constitution.<sup>99</sup> Additionally, the citizens also must overcome the prudential limits of standing.<sup>100</sup> Recently, the Third Circuit has raised the bar on standing by requiring specific evidence of injury to the receiving water body as evidence of injury in fact to the citizen group.<sup>101</sup> The

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97. *See id.*

98. Some of the monthly discharge monitoring reports are sent to agencies such as the Departments of Health and are not reviewed by environmental agencies for information relevant to noncompliance episodes.

99. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The constitutional minimum of standing consists of three discrete elements. *See id.* The first element is injury in fact. *See id.* at 560. This element requires that the party has suffered an injury as a result of the alleged violation. *See id.* The injury must be concrete and particularized, actual or imminent, and not conjectural or hypothetical. *See id.* Thus, a generalized grievance is not sufficient to confer standing. *See id.* at 561. The second element required for standing is a causal connection. *See id.* at 560. The injury must be “[f]airly . . . trace[able] to the challenged action of the defendant and not . . . th[e] result [of] the independent action of some third party not before the court.” *Id.* The third element of standing is redressability. *See id.* at 561. It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable judicial decision. *See id.*

100. In addition to the constitutional limits of standing courts impose prudential limits of standing. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *see also Allen v. Wright* 468 U.S. 737, 750-53 (1984) (discussing the historical background and precedence of prudential limits of standing). These prudential limitations are imposed by the Supreme Court based upon the Court’s idea of the role of the judicial branch in a democratic society. *See Valley Forge*, 454 U.S. at 474-76.

These limits include the zone of interests test, which holds that the injury must be of the type that the statute was enacted to protect against. *See, e.g., Bennett v. Spear*, 520 U.S. 154 (1997) (holding that Congress can and did negate prudential limitations to standing in enacting Endangered Species Act); *Lujan*, 504 U.S. at 561 (holding that the zone of interests test is a prudential limit to standing that needs to be applied in Endangered Species Act); *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153-54 (1969) (formulating the zone of interest test as a prudential limit of standing). The purpose of this test is “to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.” *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 397 (1987).

A court should also refrain from adjudicating “abstract questions of wide public significance” that amount to “generalized grievances.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In so holding, the Court explained that these types of grievances are most appropriately addressed in the legislative branch. *See id.* at 499-500.

Congress can negate these prudential standing limitations, as the Court found under the Endangered Species Act. In *Bennett*, the Supreme Court looked to the language of the statute authorizing citizen suits. The provision broadly authorized “any citizen” to bring an action under the section. The Court held that in so describing the parties who could bring an action, Congress can and did negate the prudential limitations to standing in enacting the Endangered Species Act. *See, e.g., Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322 (D.C. Cir. 1986).

101. *See Public Interest Research Group v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3rd Cir.

courts seem hesitant to “unleash” the people on violators by removing any of these limitations.<sup>102</sup>

## II. VIOLATION OF EFFLUENT LIMITATION AS INJURY TO THE RIGHTS OF CITIZENS

In order to facilitate effective enforcement of the Clean Water Act, Congress provided an expansive definition of those who may sue under the Act. In section 505 Congress enabled

any citizen [to] commence a civil action on his own behalf—  
(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this [Act] or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator [of the EPA] where there is alleged a failure of the Administrator to perform any act or duty under this [Act] which is not discretionary with the Administrator.<sup>103</sup>

Section 505(g) defines “citizen” as “a person or persons having an interest which is or may be adversely affected.”<sup>104</sup> An “effluent standard or limitation under this [Act]” includes an “effluent limitation or other limitation under

1997).

102. One of the concerns voiced is a fear that aforementioned environmental action groups are bringing the actions and not “citizens.” See Greve, *supra* note 61, at 353 (“[N]ationally or regionally organized environmental groups . . . account for roughly two-thirds of enforcement actions under the [Clean Water] Act.”). These groups, however, are better prepared to bring the actions. See *id.* at 354. Additionally, the statute itself contemplates a group of citizens bringing an action. Section 505(g) defines citizen as a person or *persons* having an interest that is or may be adversely affected. See 33 U.S.C. § 1365(g) (1994).

But in prevailing actions the citizen group is awarded attorney’s fees; therefore the groups bringing these actions do not always have the altruistic purposes envisioned in the statute. See Blomquist, *supra* note 15; Gwyn Goodson Timms, Note, *Statutorily Awarding Attorney’s Fees in Environmental Nuisance Suits: Jump Starting the Public Watchdog*, 65 S. CAL. L. REV. 1733 (1992). In other areas of law such as antitrust, where the citizen plays a role in enforcement of the regulations, there is no requirement nor is there any pretense of an altruistic purpose. Additionally, the Clean Water Act itself provides for the awarding of attorney’s fees. See 33 U.S.C. § 1365(d).

Another argument in favor of tightly reining in citizens focuses on settlement of suits with substantial payments to community projects, environmental cleanups, environmental funds, and environmental groups collectively referred to as Supplemental Environmental Projects. See Greve, *supra* note 61, at 356-57. Settlement of suits is a reality. When there is a proposed settlement in a citizen suit, the Department of Justice reviews the settlement to ensure that there is a penalty paid to the United States Treasury and that any Supplemental Environmental Projects called for in the settlement have a nexus with the violations. See *NRDC v. Interstate Paper Corp.*, 29 Env’tl Rep. Cases (BNA) 1135, 19 Env’tl. L. Rep. 20,901 (S.D. Ga. 1988).

103. 33 U.S.C. § 1365(a) (1994).

104. *Id.* § 1365(g).

section 1311 or 1312 of this Act.”<sup>105</sup> Therefore, a violation of an effluent standard in a NPDES permit is defined by Congress to be an offense actionable by a citizen under the Act so long as that citizen has “an interest which is or may be adversely affected.”<sup>106</sup>

Congress delineated the rights of private citizens so that the polluter has the right to pollute up to the level in his permit and the citizen has a right to have no pollutants from point sources in the water body she utilizes in excess of the permitted levels.<sup>107</sup> Thus, Congress recognized that a person who utilizes a water body is or may be adversely affected by such pollution. The violation of the effluent standard in a permit is a legal injury<sup>108</sup> to the rights of the citizen created by the Act and, therefore, the citizen is “adversely affected.”<sup>109</sup>

As the Supreme Court has recognized, an injury does not have to be substantial in order to be an injury in fact sufficient for standing. Courts have historically not required substantial injuries in order to find standing where the plaintiff or member of the plaintiff organization lives and recreates in the polluted area.<sup>110</sup> As the Court noted in *United States v. Students Challenging Regulatory Agency Procedures*,<sup>111</sup> a mere trifle injury will suffice. In *Sierra Club v. Morton*,<sup>112</sup> the Court recognized that smoke obscuring an otherwise pristine view is a sufficient injury to support standing. The Court declared that to live in the area which will be affected by the pollution is a sufficient injury to establish standing.<sup>113</sup> Various lower courts have followed this rationale in holding that injuries to aesthetic, conservational, recreational, and economic interests can be sufficient to support standing.<sup>114</sup>

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105. *Id.* § 1365(f).

106. *Id.* § 1365(g); *see also* Public Interest Research Group, Inc. v. Powell-Duffryn Terminals, Inc., 913 F.2d 64, 70 & n.3 (3d Cir. 1990).

107. *See* 33 U.S.C. § 1311 (1994).

108. A “legal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature.” Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 885 (1983); *see also* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1476 (1988).

109. *See* Scalia, *supra* note 108, at 887.

110. *See, e.g.*, NRDC v. Texaco Ref. & Mktg., Inc., 2 F.3d 493, 504-05 (3d Cir. 1993); NRDC v. Watkins, 954 F.2d 974, 978-81 (4th Cir. 1992); *Powell-Duffryn Terminals, Inc.*, 913 F.2d at 70-73.

111. 412 U.S. 669, 690 n.14 (1973).

112. 405 U.S. 727 (1972).

113. *See id.* at 734.

114. *See, e.g.*, *Sierra Club v. SCM Corp.*, 580 F. Supp. 862 (W.D.N.Y. 1984). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), however, the Supreme Court appeared to limit the injury in fact doctrine. This case does not apply to citizen suits for violations of the Clean Water Act. In *Lujan* the Court addressed whether Congress had the power to allow citizens to challenge the observance of the laws and the Constitution by executive branch agencies. *See id.* at 576. The question addressed was “whether the public interest in proper administration of the laws . . . can be converted

Congress has created in citizens a legal right to have water bodies that they utilize be free from discharges in violation of an effluent standard<sup>115</sup> and has authorized citizens to sue to enforce that right.<sup>116</sup> Any unpermitted discharges from a point source, or discharges in excess of permitted levels, into water bodies utilized by the citizen violate that citizen's legal right. Thus, the citizen has suffered an injury in fact.<sup>117</sup>

In addition to better approximating the congressional goal of expansive enforcement, courts should facilitate the establishment of standing for other reasons.<sup>118</sup> Congress recognized that courts do not have the expertise to determine injury to water bodies.<sup>119</sup> Therefore, Congress delegated to the executive branch the power to determine the proper levels of pollutants allowable in each water body.<sup>120</sup> Utilizing this authority, either the EPA or approved state agency has determined by regulatory action the level of a pollutant that each company is allowed to discharge into a body of water.<sup>121</sup> Any pollution above this level will or may have an adverse effect on the rights of the citizen that uses the water body.<sup>122</sup> Once it is recognized that nonpermitted pollution "may adversely affect" the citizen, and that this adverse effect is an injury sufficient for standing, the issue of whether the plaintiff suffered an injury in fact should be considered settled.<sup>123</sup> If the

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into an individual right by a statute that denominates it as such, and that permits all citizens . . . to sue." *Id.* at 576-77. The Court stated that to allow Congress to do so would violate separation of powers by transferring powers from the executive to the judicial branch. *See id.* at 577. The Court then clarified: "Nothing in this contradicts the principle that '[t]he injury required by Art. III may exist solely by virtue of statutes creating legal rights the invasion of which creates standing.'" *Id.* at 578 (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). The violation of these rights does not have to rise to the level of a legal injury at common law, but it does have to be a concrete, de facto injury. *See id.* at 578.

115. *See* 33 U.S.C. § 1311 (1994).

116. *See id.* § 1365.

117. *See* Scalia, *supra* note 108, at 885.

118. *See* Richard J. Pierce, Jr., *Causation in Government Regulation and Toxic Torts*, 76 WASH. U. L.Q. 1307, 1332-35 (1998).

119. *See id.* at 1328 ("Congress used considerable care in drafting the citizen suit provision of [the Act] in a way that would keep courts from having to become enmeshed in difficult scientific and policy disputes.").

120. *See* 33 U.S.C. § 1342 (1994).

121. The EPA or state agency is required to determine what the appropriate level of pollution allowed to enter a stream should be in determining the permit levels. *See id.*

122. *See* *DuBoise v. USDA*, 102 F.3d 1273 (1st Cir. 1996); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.* 73 F.3d 546 (5th Cir. 1996). *But see* *Public Interest Research Group, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (1997). If the plaintiff is an environmental action group, they will still have to show that the group meets the three criteria necessary for organizational standing. *See supra* note 99.

123. *See* S. REP. NO. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3745 ("An alleged violation of an effluent control limitation or standard would not require reanalysis of technological [or] other considerations at the enforcement stage. These matters will have been settled in the administrative



courts were to decide the injury issue, they would be stepping into the province of the executive branch and would create a separation of powers issue.<sup>124</sup>

This is not to say that the effect of the pollution on the water body is not important. The Act requires that the EPA consider the effect of the pollution on the water body in determining the appropriate fine.<sup>125</sup> Courts, although not bound by statute, also utilize this factor in determining the amount of fines under the Act. Experts should be called on to discuss the extent of environmental damage only in the determination of the fine and not in the standing inquiry.<sup>126</sup>

The courts have not treated the violation of an effluent standard by a permittee into the environs in which a citizen lives or recreates uniformly.<sup>127</sup> This differing treatment has resulted from confusion over what rights the Act created in the citizen.<sup>128</sup> Some courts look for an injury to the water body as a surrogate for determining whether the citizen suffers injury. These courts have failed to recognize that they need only look at the rights the citizen has under the Act and whether those rights have been violated.

In *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*,<sup>129</sup> a citizen group initiated a suit after it discovered that a company was violating the Clean Water Act by discharging produced water without a permit. The company argued that the citizen group did not have standing because it had not shown any injury resulting from the violation of the effluent standard because no detrimental effect on the receiving water had been shown.<sup>130</sup> The Fifth Circuit rejected this argument stating that an interest in the water body is sufficient to establish standing without necessarily observing pollution impacts.<sup>131</sup> The court assumed that the citizen has unlimited rights in the

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procedure leading to the establishment of such effluent control provision.”).

124. See *Pierce*, *supra* note 118, at 1336.

125. The EPA or state agency, in determining the permit levels, determines the appropriate level of pollution allowed to enter a stream. See 33 U.S.C. § 1342 (1994). Thus, it is an injury to citizens using the water body to allow pollution in excess of these levels. The remaining question is the extent of the fine, which incorporates environmental damage. In section 309, the statute lists a number of criteria to be considered in determining the appropriate amount of the fine. See *id.* § 1319(d).

126. Cf. *Dubois v. USDA*, 102 F.3d 1273 (1st Cir. 1996).

127. Compare *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), with *Public Interest Research Group, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997).

128. Subsequent cases to consider this issue have only further clouded the issue by trying to distinguish the cases while still not recognizing that injury to the creek is a poor surrogate for injury to the citizen under the Act. Injury to the creek, while relevant, does not always neatly track injury to the citizen.

129. 73 F.3d 546, 550 (5th Cir. 1996).

130. See *id.* at 555.

131. See *id.* The First Circuit followed this holding in *DuBois v. USDA*, 102 F.3d 1273 (1st Cir. 1996). The First Circuit held that someone who hiked near, and drank water from, a pond that was

water body and that any action that could threaten injury to the water body is injury sufficient to create standing in the citizen.<sup>132</sup>

In *Public Interest Research Group, Inc. v. Magnesium Elektron, Inc.*,<sup>133</sup> the Third Circuit faced a similar issue. Magnesium Elektron used expert testimony to show that the violation did not cause any adverse effects on the receiving body of water.<sup>134</sup> The court accepted this information as accurate and held that with no adverse effects shown on the receiving body of water, the citizen group could show no adverse effects to them and thus there was no injury in fact.<sup>135</sup> The court found, therefore, that the Public Interest Research Group lacked standing to bring the suit.<sup>136</sup> In so holding, the court assumed that the citizen only has a right to have the water not suffer immediately deleterious effects as a result of the unpermitted effluent.<sup>137</sup>

The discharge of a pollutant in an amount exceeding the limit in an NPDES permit into a body of water utilized by a citizen is a violation of the citizen's legal rights and thus an injury in fact sufficient for standing.<sup>138</sup> Congress determined that any pollutants discharged into the waters of the United States are deleterious and therefore sought to eliminate *all* discharges of pollutants into these waters in the Act.<sup>139</sup> While the statute allows for discharge of pollutants in accordance with an NPDES permit,<sup>140</sup> allowing such a discharge is not recognition that some pollution is good for a water

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receiving unpermitted discharges had an injury sufficient for standing without any other showing. *See id.* at 1282-83. The court noted that a person utilizing a stream for recreation may be less likely to use the stream due to known pollution in the stream. *See id.* at 1283. Additionally, with the concerns about bioaccumulation of toxins in fish, fishermen are less likely to be able to enjoy their catch for dinner. As long as the fear is not an irrational one, a fear that limits an individual's enjoyment of a polluted water body is an injury as defined by the Court. *See Sierra Club*, 73 F.3d at 555 (suggesting that interest in water body is sufficient to establish standing without necessarily observing impacts of pollution on individual seeking standing.)

132. *See id.*

133. 123 F.3d 111 (3d Cir. 1997).

134. *See id.* at 116.

135. *See id.* at 119-20.

136. *See id.* at 123.

137. *See id.* at 120. *But see id.* at 124 n.9 (stating, in dictum, that foregoing eating fish from waterbody because of reasonable fear that fish is toxic due to effluent of company may be sufficient injury for standing).

138. *See supra* notes 127-32 and accompanying text. *But see Magnesium Elektron, Inc.*, 123 F.3d 111.

139. "The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1994). The stated goals included making all waters fishable and swimmable by 1983. *See id.* § 1251(a)(2). The Act also required dischargers to stop all discharge of pollutants from entering navigable waters [of the United States] by 1985. *See id.* § 1251(a)(1).

140. Section 402 of the Clean Water Act provides that no one is authorized to discharge pollutants to waters of the United States without a permit. *See id.* § 1342.

body.<sup>141</sup> It is a license to pollute, allowing only limited pollution by permitted companies and individuals.<sup>142</sup> In the long term, however, the Act was designed to eliminate pollution.<sup>143</sup>

Although all pollution to a water body is or may be injurious to that water body, Congress delineated the rights to the water body and only authorized citizens to sue for those discharges in excess of effluent limitations.<sup>144</sup> As such, the Act does not codify a “common law” of water quality,<sup>145</sup> nor does it define the citizen’s rights in the receiving water as unlimited. It provides that the citizen has the right to be free from unpermitted discharges from point sources, or discharges in excess of permitted levels, into water bodies utilized by the citizen. For a court to hold that there is no injury because the pollution did not have an immediate, noticeable effect would be a reversion to the “dilution is the solution to pollution” theory which was rejected in the enactment of the Act.<sup>146</sup>

### III. UTILIZING ENFORCEMENT OF THE ACT TO INCREASE THE NUMBER OF FISHABLE AND SWIMMABLE WATERS IN THE UNITED STATES

There have been significant inroads into the water pollution problem using the Act’s regulatory and enforcement scheme.<sup>147</sup> Rivers no longer catch fire, and the number of fishable and swimmable streams in the United States has doubled.<sup>148</sup> The progress, however, has not been sufficient to meet the goals of the Act.<sup>149</sup> The Act has yet to bring greater than one-third of the waters of the United States into compliance with the easiest of the goals,

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141. *See id.*

142. *See generally id.*

143. *See id.* § 1251(a)(1).

144. *See id.* § 1365(a).

145. *See* S. REP. NO. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3745 (stating that citizen suit provision would not rely on common-law definition of water quality).

146. “Dilution is the solution to pollution” is an adage that allows companies to externalize their costs by not accounting for pollution to the environment. The system as envisioned by Congress would have required companies to internalize these costs by treating their wastewater to drinking water quality or switching to zero discharge systems. Congress recognized that this was not an adequate means of treating the pollution problem.

147. *See* Clean Water Act; Vice President’s Initiatives, 62 Fed. Reg. 60,448 (1997).

148. *See id.*

149. The goal of eliminating discharges of pollutants into the waters of the United States is not close to being accomplished. Far from being a discharge elimination system, the permit program more closely resembles a license-to-pollute system. *See* Marshall J. Breger et al., *Providing Economic Incentives in Environmental Regulation*, 8 YALE J. ON REG. 463, 470 (1991) (speeches before the Administrative Conference of the United States). “[M]ost people who are at least somewhat familiar with the issue see that regulation is a license to pollute, and a license to pollute for free.” *Id.*

making all waters fishable and swimmable.<sup>150</sup>

The need for more stringent regulations seems to follow from this statement.<sup>151</sup> One report, however, states that twenty percent of permittees are in significant noncompliance as defined by the EPA.<sup>152</sup> Thus, before requiring more stringent regulations, one should focus on the enforcement of regulations as they currently exist as a primary means of reducing pollution from point sources.

Enforcement of the Act against violators would require those companies and individuals to internalize the costs of clean water. The companies and individuals that continue to shirk their responsibilities under the Act and that continue to treat environmental costs as externalities are the clear beneficiaries of the nonenforcement of the Act. By failing to comply with the Act, they gain an economic advantage over their competition because they do not internalize any of the costs of clean water.<sup>153</sup> The costs of these violations and nonenforcement are spread to all citizens, through polluted waterways, increased health risks, and other social costs of pollution.<sup>154</sup>

If the regulations are made more stringent for point source polluters, there will be winners and losers within the regulated community.<sup>155</sup> The winners will be those companies who are currently violating the Act. If they continue to violate, they will enjoy an even greater competitive advantage.<sup>156</sup>

The losers will be those in the regulated community who choose to continue complying with their permits. They will face increasing costs of compliance putting them at an even more distinct competitive disadvantage.<sup>157</sup> By obeying the law and internalizing some of the

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150. The stated goals included making all waters fishable and swimmable by 1983. See 33 U.S.C. § 1251(a)(2) (1994). Reports vary as to the exact percent of streams that are still not meeting the goal of fishability or swimmability. Compare Gore, *supra* note 47 (stating that 33 percent of the surveyed waters of the United States are not fishable or swimmable), with *Dirty Water Scoundrels: Clean Water Act: Progress & Unfulfilled Promise* (last modified Mar. 25, 1997) <<http://www.pirg.org/pirg/enviro/water/dws97/cwa.htm>> [hereinafter *Dirty Water Scoundrels*] (stating that “40 percent of our rivers, lakes, and estuaries are still too polluted for safe fishing or swimming”).

151. A significant amount of the nation’s water pollution problem does result from nonpoint sources. More significant enforcement effort on point sources alone is not the answer. Indeed, while improvements in water quality may be made by the proposal contained in this Note, it is also necessary and expected for widespread water quality improvements to control nonpoint source water pollution as recognized in proposed House Bill 1453 and proposed Senate Bill 645. Clean Water Enforcement and Compliance Improvement Act of 1997, H.R. 1453, 105th Cong. (1997); S. 645, 105th Cong. (1997).

152. See *Dirty Water Scoundrels*, *supra* note 150.

153. See FIELD, *supra* note 2, at 71 (“[A]t the end of the year the profit-and-loss statement . . . will contain no reference whatever to . . . real downstream external costs.”).

154. See *id.*

155. See *id.*

156. See *id.*

157. See *id.*

environmental costs of doing business, they will face increasing costs of even more stringent regulations. These increased costs would equate to a penalty for compliance.<sup>158</sup>

If Congress instead emphasizes enforcement of the Act as it exists, those in the regulated community who have not yet internalized the environmental costs will be forced to do so.<sup>159</sup> This would diminish the competitive advantage of noncompliance resulting in a more level playing field.<sup>160</sup>

#### IV. PROPOSALS FOR ENHANCING CIVIL ENFORCEMENT OF THE CLEAN WATER ACT

One method of enhancing enforcement is increasing the number of inspectors and enforcement personnel, as well as increasing the amount of time spent inspecting at both the state and federal level.<sup>161</sup> This is an expensive solution, however. There are other ways that compliance can be enhanced without drastically increasing governmental costs. Lifting barriers to citizen initiated suits is one such way.

##### A. Utilize Informational Avenues to Raise Awareness

Broad dissemination of information can enhance enforcement of the Act and aid in bringing companies into compliance. Television, newspapers, magazines, and the Internet are major influences in the lives of citizens.<sup>162</sup> The Act should use these media tools to bring problems to the attention of concerned constituents; this may prod both the agencies and citizens into

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158. See *id.* at 81 (“[W]hat we want to do is end up with efficient levels of environmental quality that are equitably distributed.”). One important aspect of environmental policy is its fairness. See *id.* at 181.

159. See *id.*

160. See *id.* at 71.

161. See Hodas, *supra* note 12, at 1579 n.133 (“EPA inspectors do little inspection; more than three-fourths of the inspectors spend less than 20% of their time inspecting.”).

162. See, e.g., G. Ray Funkhouser, *An Exploratory Study in the Dynamics of Public Opinion*, PUB. OPINION Q., Spring 1973, 62-75 (explaining that because the news media are believed by many people, including policymakers, to be reliable sources of information, the news media often results in policy responses that are incorrect.); Diana C. Mutz & Joe Soss, *Reading Public Opinion*, PUB. OPINION Q., Fall 1997, 431-51 (showing how the media presentation of public opinion, while possibly not being very effective at changing personal opinion, can affect the perception of the importance of the issues and the direction the public heads). This has been used by the media to change perception of some environmental issues. See, e.g., *Science Meets the Press: Can the Media be Trusted?: Quest for Better Gatekeeping in Covering Complex Issues*, L.A. TIMES, Sept. 18, 1994, at M4. This ability is sometimes used irresponsibly in an attempt to change public opinion. See *id.*; George Will, *Earth Day's Hidden Agenda*, WASH. POST, Apr. 19, 1990, at A27 (describing a week of environmental concern as “the media all jump[ing] feet first, on cue, into the coordinated manipulation of public opinion”).

action.<sup>163</sup> Once the public is aware of pollution issues, people and agencies, as well as the violators themselves, are much more likely to take the steps necessary to correct the violations.<sup>164</sup>

In addition to the monthly reports that are required under the Act, companies should be required to summarize these reports annually and send the summary to the EPA.<sup>165</sup> This summary should contain all of the information that has been provided during the year, including the number of days that the discharge exceeded the permit levels and how many excess pounds of pollutants and toxics were released to the receiving water as a result.<sup>166</sup>

This can be accomplished by amending Section 308(a)(4)(A)(ii) to read as follows:

(ii) make such reports, including an annual summary of the number of days that the permittee has exceeded the permit levels of any pollutant and the excess pollution resulting from said exceedances, to the Administrator of the Environmental Protection Agency.

This information can then be provided to the general public through press releases, the federal register, or the Internet.<sup>167</sup> This measure, in combination with the following, will help ensure that citizen enforcement is utilized to bring violators into compliance.

*B. Define Violation of an Effluent Standard into the Environs in Which a Citizen Lives or Recreates as Injury in Fact*

This Note has discussed the violation of an effluent standard into the

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163. See *Americans Unaware of Environmental Threat from Loss of Biodiversity*, U.S. NEWSWIRE, July 20, 1993 (explaining that once the importance of biodiversity was explained to the public, an overwhelming majority were in favor of taking steps to conserve biodiversity).

164. See *id.*

165. Many of the monthly Discharge Monitoring Reports are currently being generated by lower level employees and are never seen by upper management. Some are sent to agencies such as departments of health and are not reviewed by environmental agencies for information relevant to noncompliance episodes.

166. This is not meant to imply that all episodes of exceedance are permit violations. There are upset provisions and other exemption provisions within the Clean Water Act and permits that may be applicable to the episode. The information being provided, however, would highlight possible compliance problems.

167. Alternatively, the Environmental Protection Agency and other agencies receiving the monthly Discharge Monitoring Reports could summarize the data from these reports. The EPA could then compile this information and release the information to the public annually. In any event, the information would need to be localized to be relevant. One method would be to organize the pollutant information by county and receiving water.

environs where a citizen lives or recreates as injury in fact.<sup>168</sup> Yet courts do not always agree with this assertion.<sup>169</sup> Congress can and should clarify this point by defining the legal rights of the citizen and what actions would violate that right. Congress has the authority to define injuries where none before existed.<sup>170</sup> As Justice Kennedy stated in *Lujan v. Defenders of Wildlife*:

In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.<sup>171</sup>

The Act is an opportunity to incorporate such a definition. By adding the following language to Section 505 of the Clean Water Act,<sup>172</sup> Congress can clarify that such a violation is an injury.

505(j): Any Discharge in violation of any effluent standard in any permit under section 402 or 404 or any Discharge of any pollutant without a valid permit as required under section 402 or 404, to a water body is an injury in fact (sufficient to support standing) to any citizen who lives or recreates within the environs of said water body.

Adoption of this language would clarify the legal rights of the citizen, define violation of an effluent limitation as an injury Congress “seeks to vindicate,” and “relate the injury” to all persons who live or recreate in the environs in which the violation is occurring. Congress would thereby help to eliminate a procedural roadblock in the citizen enforcement arena.<sup>173</sup> Less time and resources would be devoted to proving a procedural element, thereby allowing courts to focus on the merits of citizen-initiated cases.

In doing so, Congress would not be “conferring standing” on a group of

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168. See *supra* Part II.

169. See *supra* notes 127-46 and accompanying text.

170. See *Warth v. Seldin*, 422 U.S. 490, 500 (1975); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

171. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) (internal citations omitted).

172. 33 U.S.C. § 1365 (1994).

173. Standing is often a hotly contested issue in environmental citizen suits. See Roger Beers, *Standing and Rights of Action in Environmental Litigation*, ALI-ABA, June 24, 1996, at 1. In the alternative, Congress could add the following language: “Each citizen has the legal right to have all the water bodies utilized by said citizen free from unpermitted discharges or discharges in excess of permitted levels from a point source.” This would clarify what a citizen’s legal rights are and what type of action would violate those rights.

citizens. Congress would simply be clarifying what right the citizen has and what actions would violate that right so as to injure the citizen.

#### CONCLUSION

The enforcement scheme in the Act is designed as a system to ensure vigilance in environmental enforcement. Nevertheless, there are still cracks in the system that allow some violators to escape enforcement. Before making regulations more stringent and penalizing those in the regulated community who are complying with the Act, the Act should be enforced as it now exists, thereby bringing those in the regulated community up to the current standards. Better enforcement would result in benefits to the community without widening the competitive advantage of those who refuse to internalize environmental costs. Along with increasing enforcement personnel, this enhanced enforcement can be accomplished in other ways without greatly increasing costs to the regulating community. Congress should therefore amend the Act to require permittees to submit an annual summary of their discharges and define violation of an effluent standard as injury in fact.

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